Percon Corp Sdn Bhd v Yap Choon Loy

COURT OF APPEAL (KUALA LUMPUR) — APPEAL NO W-02-143 OF 1996
SITI NORMA YAAKOB, MOKHTAR SIDIN JJCA AND MOHD NOOR AHMAD J
19 JUNE 1998

Civil Procedure *— Time — Extension of time — Application for — Whether an application for extension of time had to be separately made and cannot be prayed for in the same originating motion seeking to set aside an award — Rules of the High Court 1980 O 3 r 5(1)*

An award dated 22 May 1996 ('the award') was made following arbitration proceedings against the appellant. A copy of the award was received by the parties by 21 July 1995. Upon failure of the appellants to pay up the amounts of the award, the respondent filed for leave to enforce the award. On 1 September 1995, the appellant filed an originating motion — supported by an affidavit affirmed by the appellant's company secretary setting out the various grounds — to set aside the award.

The respondent averred that the appellant's originating motion was out of time as it was filed on 1 September 1995. The appellant subsequently filed a second affidavit seeking leave to include a prayer for an extension of time in their originating motion. The learned trial judge held that prayers for extension and setting aside the award could not be dealt with in one application.

Held, allowing the appeal:

(1) The learned trial judge had misdirected himself when he held that an application for extension had to be separately made and could not be prayed for in the same originating motion seeking to set aside the award (see p 871E); *Prodexport State Company for Foreign Trade v ED & F Man Ltd* [1972] 2 Lloyd's Rep 375 followed.

(2) Time had started to run from 22 May 1995 and clearly the appellant was out of time when they filed their originating motion on 1 September 1995. However, the delay had been satisfactorily explained by the appellant's supporting affidavit. Therefore, an extension of time was granted and the proceedings be remitted so that the substantive prayer to set aside the award could be heard on its merits (see pp 870E–F and 872F–G).

[Bahasa Malaysia summary

Suatu award bertarikh 22 Mei 1996 ('award tersebut') telah dibuat susulan daripada prosiding timbangtara terhadap perayu. Sesalinan award tersebut telah diterima oleh pihak-pihak pada 21 Julai 1995.

Atas kegagalan perayu-perayu untuk membayar amaun award tersebut, penentang memfailkan kebenaran untuk menguatkuasakan award tersebut. Pada 1 September 1995, perayu memfailkan suatu usul pemula — yang disokong oleh suatu afidavit yang diikrar oleh setiausaha syarikat perayu yang menyatakan pelbagai alasan — untuk mengetepikan award tersebut.

Penentang menegaskan bahawa usul pemula perayu adalah di luar masa kerana ia difailkan pada 1 September 1995. Perayu kemudiannya memfailkan afidavit kedua meminta kebenaran supaya boleh memasukkan permohonan untuk perlanjutan masa dalam usul pemula mereka. Hakim perbicaraan yang arif telah memutuskan bahawa permohonan untuk perlanjutan dan untuk mengetepikan award tersebut tidak boleh diuruskan dalam satu permohonan.

Diputuskan, membenarkan rayuan:

(1) Hakim perbicaraan yang arif telah menyalah arah dirinya apabila beliau memutuskan bahawa suatu permohonan untuk perlanjutan hendaklah dibuat secara berasingan dan tidak boleh dipohon dalam usul pemula yang sama yang memohon agar award tersebut diketepikan (lihat ms 871E); *Prodexport State Company for Foreign Trade v ED & F Man Ltd* [1972] 2 Lloyd's Rep 375 diikut.

(2) Masa telah bermula dari 22 Mei 1995 dan adalah jelas perayu berada di luar masa apabila mereka memfailkan usul pemula pada 1 September 1995. Namun demikian, kelewatan telah dijelaskan secara memuaskan oleh afidavit sokongan perayu. Maka, suatu perlanjutan masa telah dibenarkan dan prosiding diremitkan supaya permohonan substantif untuk mengetepikan award tersebut boleh didengar atas meritnya sendiri (lihat ms 870E–F dan 872F–G).]

Notes

For cases on an application to extend time, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4857–4877.

Cases referred to

Archipelagos, The [1979] 2 Lloyd's Rep 289 (refd)
Prodexport State Company for Foreign Trade v ED & F Man Ltd [1972] 2 Lloyd's Rep 375 (folld)

Legislation referred to

Arbitration Act 1952 s 24(2)
Rules of the High Court 1980 O 3 r 5(1), O 41 r 5(1), O 69 r 2(1)(c), O 69 r 4(1)(b)

Appeal from: Originating Motion No R1–25–134 of 1995 (High Court, Kuala Lumpur)

Shahul Hameed Amirudin (*T Kuhendran* with him) (*Albar Zulkifly & Yap*) for the appellant.

Mah Weng Kwai (*Mah Weng Kwai & Associates*) for the respondent.

Siti Norma Yaakob JCA (delivering judgment of the court): We had allowed this appeal with costs and we now give our reasons for having decided so.

In the court below, the appellant had on 1 September 1995 filed an application under s 24(2) of the Arbitration Act 1952 ('Act 93'), to set aside an award dated 22 May 1996. Pursuant to O 69 r 2(1)(c) of the Rules of the High Court 1980 ('the Rules'), the application was brought by way of an originating motion and it contains three main prayers:

(1) The award dated 22 May 1996 be set aside.

(2) Costs of the application and of the arbitration be paid to the appellant by the respondent.

(3) Any other order or relief that the court deems necessary.

The award was made following arbitration proceedings initiated by both parties before a court appointed arbitrator to determine disputes arising from a construction contract entered into between them. On 22 May 1995, the arbitrator published his award by notifying the solicitors for both parties that the award was ready for collection subject to his fees and expenses being paid in full. There was some delay in the payment of the fees and expenses but by 21 July 1995, both parties received a copy of the award. Under the award, the appellant are to pay the respondent RM510,560.09 being the compensation due for the premature termination of the construction contract, interest at 8%pa from 5 May 1989 to date of realization, costs of the award assessed at RM81,031.46 and costs of the reference to be taxed.

Upon receipt of the award, the respondent's solicitors made written demands to the appellant's solicitors to pay up the amounts of the award. These demands produced no response from the appellant and on 23 August 1995, the respondent filed Originating Summons No R2–24–45–95 seeking leave to enforce the award under s 27 of Act 93. The respondent, however withdrew this originating summons and filed a second one, R–24–49–95, on 28 September 1995 seeking substantially the same prayer as the first originating summons. In the meantime, the appellant filed the originating motion we had mentioned earlier supported by an affidavit affirmed by the appellant's company secretary setting out the various grounds for setting aside the award.

In his affidavit supporting the second originating summons, the respondent averred that the appellant's originating motion is barred by time as there had been non-compliance with O 69 r 4(1)(b) of the Rules that stipulates that an application under s 24(2) of Act 93 may only be made within six weeks after the award has been made and published to the parties. Since the arbitrator had made and published his award to the parties on 22 May 1995 by way of notification to their respective solicitors, the six weeks period started to run from that date and expired on

3 July 1995. Clearly, the respondent contended the appellant's originating motion was out of time as it was filed on 1 September 1995. A

The appellant, on realizing this, remedied the situation by filing a second affidavit in their originating motion seeking leave to amend the originating motion to include a prayer for an extension of time. At the hearing of the originating motion on 20 November 1995, the respondent B did not object to the amendment sought by the appellant and in allowing the amendment, the learned trial judge also ordered that the amended originating motion be filed and served on the respondent within 14 days and the hearing on the merits of the appellant's application be adjourned to 13 December 1995.

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However, the hearing took place on 23 January 1996 and the parties proceeded to argue on the appellant's first prayer for the abridgment of time, leaving the merits of the application to be decided upon the outcome of the first prayer. After a somewhat prolonged hearing, the learned trial judge held that the application for extension had not been properly brought before him and as a consequence thereof, he dismissed the amended D originating motion with costs without hearing the merits of the application. It is against this ruling that the appeal before us is founded.

There were initial objections as to when the six weeks period under O 69 r 4(1)(b) of the Rules should run, with the appellant maintaining that time should be calculated from 21 July 1995 when the award was received E and the respondent contending 22 May 1995 when the notification was sent and received. Before us, the appellant had accepted that time started to run from 22 May 1995 and clearly they were out of time when they filed their originating motion on 1 September 1995. Perhaps they were swayed by the decision in the case of *The Archipelagos* [1979] 2 Lloyd's Rep 289, where the same phrase 'published to the parties' appearing in the English F Rules of Supreme Court as O 73 r 5 — which incidently is in pari materia to our O 69 r 4(1)(b) of the Rules — has been interpreted to mean that publication to the parties is complete on notice.

Under these circumstances, was there a proper exercise of discretion when the learned trial judge refused to grant the extension of time? From G his written judgment, it is clear that his refusal was based on his findings that:

(1) there had been a procedural defect as the application for extension had not been properly brought before him. He contended that it should have been made separately and not added to the same originating motion seeking to set aside the award. H

(2) there was insufficient affidavit evidence to warrant the exercise of his discretion.

Order 3 r 5(1) of the Rules contains the following provisions:

> The Court may, on such terms as it thinks just, by order extend or abridge I the period within which a person is required or authorized by these rules or by any judgment, order or discretion, to do any act in any proceedings.

The learned trial judge held that the aforesaid provisions stipulate for a separate application and that prayers for extension and setting aside the

award cannot be dealt with in one application. From our reading of the provisions, it is our considered opinion that O 3 r 5(1) makes no such stipulation. It merely empowers the court the discretion to extend or abridge time and, in the circumstances of this appeal, it is to extend the six weeks period to cover the period from 3 July 1995 when the six weeks period expired to 1 September 1995, when the originating motion was filed. The double-barrelled procedure (to borrow the words used by Mocatta J in the case of *Prodexport State Company for Foreign Trade v ED & F Man Ltd* [1972] 2 Lloyd's Rep 375) adopted by the learned trial judge in the court below is to be discouraged for the same reasons that were expressed in the English case in the following manner.

> Now that a motion to set aside (or remit) an award must be made to a single judge (see O 73 r 2) and, accordingly by O 3 r 5, leave to extend the time within which a move to set aside an award after the expiry of the six weeks from publication allowed by O 73 r 5 must also be made to a single judge, it is clearly desirable, in most cases, for one notice of motion to be taken out asking for both kinds of relief. The same affidavit or affidavits may support both and the suggested course is likely to effect substantial economies over the somewhat clumsy double-barrelled procedure adopted here.

Clearly, the learned trial judge had misdirected himself when he held that an application for extension had to be separately made and cannot be prayed for in the same originating motion seeking to set aside the award.

We now turn to the more substantial issue as to whether there are sufficient material disclosed by the appellant in their affidavit as to the cause of the delay in filing the originating motion. Such material is to be found in the affidavit affirmed on 8 December 1995 by one Azizah bte Mohd Noor, the appellant's company secretary. In the affidavit, she put the blame for the 59 days delay on the appellant's former solicitors, Messrs Durai & Associates for the failure to notify the appellant of the receipt of the notification of publication on 22 May 1995, a fact which she had gathered from investigations with the employees of Messrs Durai & Associates. All along the appellant was under the mistaken belief that time only started to run from the date of receipt of the award on 21 July 1995 and as such they have met the deadline when they filed the originating motion on 1 September 1995, that being the last day of the six-week period.

Objection was taken by the respondent to this part of the affidavit evidence as being hearsay, such evidence can only come by way of an affidavit from Messrs Durai & Associates. We consider this contention to be without merit as O 41 r 5(1) of the Rules allows an affidavit to contain facts as the deponent is able of his own knowledge to prove. As the company secretary, Azizah is no stranger to the appellant, her statement — of her knowledge of when Messrs Durai & Associates had received the notification as gleaned through investigations conducted by the appellant's present solicitors — is still subject to proof. In the case of affidavit evidence, such proof can be provided by contemporaneous documents or the conduct of parties as tending to show that the evidence objected to is probable.

It has been shown that the originating motion filed on 1 September 1995 contained no prayer for an extension. Whilst such omission can be interpreted to mean that the appellant's legal advisers were not aware of the implications of O 69 r 4(1)(b) of the Rules, it is equally applicable to the appellant's contention that they were not aware that their former solicitors had received the notification earlier.

Another cause for the delay disclosed in Azizah's affidavit was the time taken by the parties to negotiate as to the extent of their respective contributions for the arbitrator's fees and expenses and the actual payments of their contributions.

It would appear that by 28 June 1995 (which was still within the six weeks period) agreement was reached that each party will bear half the costs of the award and that each party would forward his share of the costs directly to the arbitrator. This is borne out by the letter appearing at p 206 of the appeal records. It is not clear when the appellant paid their share of the fees and expenses but a letter dated 14 July 1995 from the respondent's solicitors indicates that the appellant paid their share before the respondent did so through his solicitors' letter dated 14 July 1995.

The learned trial judge did not consider these matters as he was more concerned that the application for extension be separately filed and had he done so, he would have arrived at a different conclusion. This is so as he had already held that the respondent would not suffer any irreparable damage if discretion is exercised as the amount of the award had already been deposited in a client-solicitor's account in favour of the respondent and an order had already been obtained to stay the enforcement of the award.

Since delay has been satisfactorily explained, we had allowed the appeal by granting an extension of time in terms of prayer (1) of the amended originating motion, remitted the proceedings so that the substantive prayer to set aside the award can be heard on its merits, ordered the respondent to pay the costs of the proceedings before us and in the court below and directed that the deposit be refunded to the appellant.

Appeal allowed.

Reported by Loo Lai Mee